Editor's Note: Reconsideration granted in part and denied in part by Order dated January 29, 2002, attached to the end of this Decision as 155 IBLA 219A through 219L

VON L. AND MARIAN SORENSEN
v.
BUREAU OF LAND MANAGEMENT

IBLA 98-365 Decided July 18, 2001

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer affirming a decision of the Elko District Manager, Bureau of Land Management, Nevada State Office, to adopt the no action alternative set forth in an environmental assessment of an interim allotment management plan. NV-010-946.

Dismissed.

1. Administrative Practice--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Office of Hearings and Appeals-- Rules of Practice: Appeals: Jurisdiction

   The Board of Land Appeals will not entertain an appeal when no effective relief can be afforded an appellant. Where a challenged interim decision has been superceded by a final multiple use decision, this Board will decline to entertain the appeal with respect to the interim decision because no effective relief is available.

2. National Environmental Policy Act of 1969: Generally

   NEPA is primarily a procedural statute designed to ensure a fully informed and well-considered decision after taking a "hard look" at the environmental effects of any major Federal action. The Board, reviewing a BLM record of decision on the basis of an environmental assessment, will ensure that the agency undertook full and adequate review but will not substitute its judgment for that of BLM.

3. Administrative Practice--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Office of Hearings and Appeals-- Rules of Practice: Appeals: Jurisdiction--National Environmental Policy Act of 1969: Generally

Where an appellant opposes BLM's choice among alternatives in a record of decision on the basis of an environmental assessment and asks that the Board implement the appellant's choice of alternatives, the Board will not entertain the appeal when: (1) reversal would require a new NEPA process rather than implementation of appellant's choice and (2) a subsequent BLM decision has already supplanted the record of decision in question.

4. Administrative Practice--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Office of Hearings and Appeals-- Rules of Practice: Appeals: Jurisdiction

A well-recognized exception to the rule of mootness is that the Board will not dismiss an appeal when an issue raised by the appeal is capable of repetition, yet evading review. A decision on appeal does not fall into this exception where the appellant did not appeal a subsequent BLM decision supplanting the decision at issue.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for appellants; John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Von L. and Marian Sorensen (together "Sorensen") have appealed a May 1, 1998, decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer, issued after a hearing, addressing Sorensen's challenge to a January 12, 1994, decision (1994 BLM decision) of the Elko, Nevada, District Office, Bureau of Land Management (BLM). Judge Sweitzer's May 1, 1998 decision (May 1 ALJ decision) affirmed that 1994 BLM decision, which chose the no action alternative from alternatives analyzed within an environmental assessment (EA). BLM thereby rejected the alternative of adopting an Interim Allotment Management Plan (IAMP) completed by BLM and Sorensen in 1993.

Statement of Facts

This case involves the Spruce Allotment which is within the jurisdiction of the Elko District Office of BLM in Nevada. Sorensen grazes cattle on Federal lands within this allotment and owns private lands within its boundaries.

Sorensen's relatives and others purchased, between 1950-73, grazing privileges in Elko County from livestock operators who were grazing sheep under priority uses obtained prior to enactment of the Taylor Grazing Act

of 1934, 43 U.S.C. §§ 315-316 (1994). At the time of the Sorensen family's acquisitions, its predecessors were authorized to graze sheep but were also unilaterally grazing some cattle. In 1964, BLM began to issue temporary cattle licenses to the Sorensen family. In 1968, Von and Marian obtained certain Sorensen family grazing privileges and began a livestock operation in Elko County, based on temporary licenses to graze cattle in lieu of sheep.

In 1975, land in Elko County on which various members of the extended Sorensen family and Kenneth Jones grazed sheep and cattle was denominated the Spruce Allotment. After subsequent acquisitions, for purposes relevant to this case, Sorensen acquired and held permits for 22,523 sheep animal unit months (AUMs), all of which Sorensen used for grazing cattle under temporary use permits. 1/ The amount of temporary cattle usage permitted to Sorensen was adjudicated as a result of a protest filed by Sorensen seeking permanent cattle use. (A-32, Notice of Final Advisory Board Recommendation and Decision of District Manager, January 11, 1974 (deferring decision on permanent conversion of sheep to cattle on 53% ratio, and retaining temporary use)).

In 1976, Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (1994), establishing provisions and policies governing the management of Federal public lands. Relevant here, Congress required the Secretary to establish land use plans for tracts or areas of Federal land. 43 U.S.C. § 1712 (1994). Land use management plans are accompanied by environmental impact statements prepared under the terms of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994). 2/ As amended by sections 7 and 8 of the Public Rangelands Improvement Act of 1978, Pub.L. 95-514, 92 Stat. 1803, October 25, 1978, FLPMA section 402 authorized the Secretary to establish allotment management plans (AMPs) for permits and leases for domestic livestock grazing, after consultation requirements were met, and subject to revision, termination or substitution with newly developed plans. 43 U.S.C. § 1752(d) (1994). See also public consultation requirements in, inter alia, Pub.L. 95-514, § 13, amending FLPMA section 309, 43 U.S.C. § 1739(e); and 43 U.S.C. §§ 1901-08 (1994), specifically 43 U.S.C. § 1904(c).

1/ All of the above-stated facts derive from the Mar. 9, 1993, IAMP, described in more detail below, and in the record as Appellants' Exhibit (A-) 15, at 3-6.

2/ That provision of NEPA requires Federal agencies to prepare an environmental impact statement (EIS) for a major Federal action significantly affecting the quality of the human environment. The agency must consider its preferred course of action and alternatives to that action, and take a "hard look" at the environmental consequences. See 40 CFR 1501.2(c). If the agency chooses to, it may conduct an EA of a proposed action and go forward if it makes a "finding of no significant impact" (FONSI), subject to agency rules, and those of the Council on Environmental Quality (CEQ) at 40 CFR Subpart 1500. If a significant impact is anticipated, an EIS is prepared.

Regulations in effect prior to 1995 established the terms and conditions of AMPs. 43 CFR 4120.1(a)-(c) (1994). An AMP was defined as "a documented program which applies to livestock grazing on the public lands, prepared in consultation, cooperation and coordination with the permittee(s), lessee(s) or other involved affected interests." 43 CFR 4100.0-5 (1994). This provision defined "consultation, cooperation and coordination." Id. BLM issued BLM Manual Handbook H-4120-1, for Grazing Management on June 20, 1984. (Respondent's Exhibit (R-) 41.) This document specifies how coordination is to be conducted (R-41, BLM Manual Handbook H-4120-1.2 ¶¶ D-G), and that further NEPA analysis, including EAs, shall be conducted where implementing actions within AMPs have not fully been analyzed in an EIS. Id. at ¶ I. The Manual, as opposed to the rules, contains the reference to interim AMPs. BLM Manual H-4120-1.2.K specifies that if a lessee or permittee does not agree to the implementation of an AMP "[i]nterim terms and conditions required to prevent resource damage and minimize conflicts until AMPs are fully operational may be incorporated into permits and leases." 3/

Consistent with FLPMA, the BLM Elko District Office prepared a Proposed Resource Management Plan and Final Environmental Impact Statement (RMP/EIS) for the Wells Resource Area in Nevada, in 1983. (R-5a (Draft) and R-5b (proposed)). The RMP established Resource Conflict Areas (RCAs) within the Wells Resource Area. Within the "Spruce/Goshute RCA," the RMP identified the Spruce Allotment as an area in need of improvement, with a goal of retaining current livestock use, as opposed to use of available AUMs, many of which were in suspended status. (R-5b at A-2, A-11.) The RMP/EIS denominated allotments in need of improvement with the letter "I," and defined them as ones containing such characteristics as range conflicts and a need for change in existing livestock activity and distribution. (R-5a at 2-28, points 3, 5, 7.) On July 16, 1985, the Nevada State Director, BLM, issued a Wells Record of Decision (ROD) adopting the Wells RMP/EIS. (R-5c.) In this document, the State Director made clear that this RMP was the planning decision from which numerous implementation decisions would follow.

> The next phase of this RMP/EIS is implementation. Allotment Management Plans (AMPs), Habitat Management Plans (HMPs) for wildlife, and Herd Management Area Plans (HMAPs) for wild horses are currently being developed.

(R-5c, ROD at S-1.)

3/ While provisions of the BLM Manual do not have the force and effect of law, they are binding on BLM. Franklyn Dorhofer, et al., 155 IBLA 51, 55 n.6 (2001), citing Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); Howard B. Keck, Jr., 124 IBLA 44, 55 (1992). Manual provisions will generally be followed by the Board, Beard Oil Co., 105 IBLA 285, 288 (1988), unless they are inconsistent with the regulations on which they give guidance. Jesse H. Knight, 155 IBLA 104, 122 (2001), citing Thermal Energy Co, 135 IBLA 291, 325 (1996).

On September 15, 1986, the BLM Elko District Manager issued an initial Rangeland Program Summary (RPS) for the Wells Resource Area. (R-6). Among other directives, the RPS identified the Spruce Allotment as the eighth priority for an AMP. Id. at 5, Table I. In 1987, BLM prepared a Draft Spruce Allotment Management Plan proposing to convert the permitted sheep preference to cattle, and an "Environmental Assessment, EA-NV-010-87-093," for the "Change-In-Kind of Livestock and Implementation of the Spruce Allotment Management Plan." (R-7 and R-8.) The documents were issued for public review on January 20, 1988. (A-15 at 9.)

While the record does not contain his written comments, it indicates that Sorensen disagreed with the 1988 Draft AMP for three reasons. Sorensen had problems with the extent of the required proposed seedlings and with the method of wild horse management. But, most significantly, Von Sorensen testified:

> The draft AMP proposed a 53 percent conversion ratio from licensed sheep use to cattle AUMs, with the remaining adjudicated preference being placed in suspended use. The permittees contested this unilateral reduction in active preference due to the fact that it was not based on actual monitoring results, but rather on a 20-year-old range analysis which relied on forage survey data that is now 40 years old.

(A-15 at 9; see also testimony of Von Sorensen, Transcript of Hearing before ALJ Sweitzer, September 24-26, 1997 (Tr.), 381.) Thus, Sorensen appeared to want a greater percentage conversion ratio than that considered and deferred in 1974. (A-32.)

By 1991, the Spruce AMP was not completed. On January 2, 1991, BLM issued a notice of its intention to complete several AMPs, including one for the Spruce Allotment. (R-11.) BLM received responses from environmental organizations and local groups indicating an interest in that allotment, among others. (R-12, R-13, and R-14.)

In 1991, Sorensen hired Resource Concepts, Inc. (RCI), to advise him on moving forward with respect to the Draft AMP. According to the testimony of RCI consultant Donald Henderson, RCI recommended to Sorensen that "it was in his best interest to work with BLM to complete the 1988 Draft AMP." Id. at 305. After initial contact, RCI and Sorensen met with BLM on June 10-11, 1991, and agreed on a "process that will be used to implement an interim management plan on the allotment and a comprehensive listing of any new items that [BLM] would like to see incorporated into an updated AMP." (A-5, Letter dated June 14, 1991, from RCI to BLM.) Accordingly, Sorensen and BLM moved forward with a two-step process intended to devise an interim AMP prior to a final AMP for the allotment. All agreed that RCI would undertake a first draft employing the information in the 1988 Draft RMP. (Testimony of Donald Henderson of RCI, Tr. 310.)

During the process of devising a joint IAMP, BLM and Sorensen continued to dispute the sheep to cattle conversion figures. BLM wished to

limit livestock conversion to 10,939 AUMs, while Sorensen sought 13,100 AUMs. (A-7, BLM February 10, 1992, comments on RCI draft IAMP with handwritten edits by RCI.) Ultimately, BLM and Sorensen entered into a written agreement by which, for purposes of the IAMP, RCI would employ a cattle conversion figure of 13,100 active cattle AUMs. (A-9, April 2, 1992, "Agreement on Certain Issues for the Spruce Interim AMP.")

After more drafts, on March 9, 1993, RCI produced a completed IAMP. (A-15; R-17.) BLM signed the document on April 13, 1993. Id. On this same date, BLM and Sorensen entered into a Spruce Allotment, Valley Mountain Allotment, Range Line and Management Agreement (RLA), dividing the Spruce Allotment into two separate allotments. The newly designated Spruce Allotment would cover the area grazed by Sorenson, and the Valley Mountain Allotment would cover that grazed by Kenneth Jones. (R-18.)

In May and June 1993, BLM issued the IAMP for public comment, after concerns were raised in a BLM State Office review that proper coordination procedures had not been followed. (R-19, R-20, and R-21; Testimony of Bill Baker, BLM, Tr. 226.) In July 1993, BLM received four challenges to the IAMP, in which the appellants argued that BLM had violated consultation procedures and failed to conduct appropriate NEPA review for the IAMP. The challengers raised various substantive challenges to the IAMP, and in particular, to its sheep:cattle conversion ratio. (R-22, R-23, and R-24.) On August 23, 1993, BLM notified Sorensen that it was rescinding the approval of the IAMP, pending the conduct of NEPA review and consideration of comments; BLM also notified him of the appeals against BLM's April 1993 approval. (R-26.)

BLM prepared a draft Environmental Assessment, Change-in-Kind of Livestock and Implementation of the Spruce Interim Allotment Management Plan, BLM\EK\PL-093\046. (R-28.) The EA considered the proposed action of adopting the Spruce IAMP, including the permittee's proposed change in livestock to 13,100 active cattle AUM's, and the RLA separating the Spruce Allotment into two allotments. Id., EA at 2-3. It also considered a BLM proposal for change in livestock to 10,939 AUMs, and a no action alternative. Id., EA at 5-7. BLM issued the final EA on December 15, 1993. (R-35.)

On January 12, 1994, BLM issued a "Proposed Decision Rescinding Approval of the Spruce Interim Allotment Management Plan (AMP)" as well as the RLA, in favor of moving forward with further allotment evaluation based on more current data. The decision reasoned:

> The Spruce Interim AMP was based on monitoring data collected through 1986. The allotment evaluation would include analysis of monitoring data at least through 1993. After careful consideration, cooperation, and consultation with all affected interests the No Action Alternative was the most sound decision.

(January 12, 1994, Proposed Decision at 2.)

The proposed decision became final in the absence of a protest filed within 15 days. Id.; 43 CFR Subpart 4160. The appellants who challenged the IAMP withdrew their appeals. (Withdrawal Notices and Orders at A-20 through A-25.) Sorensen timely appealed, and this Board transferred the appeal to the Hearings Division. Von L. and Marian Sorensen, IBLA No. 98-216, Order dated April 23, 1998. In the appeal, Sorensen raised a host of challenges to the process which, to the extent necessary, will be discussed below.

Judge Sweitzer accepted two sets of record documents from both parties, as described and cited above, and multiple pleadings. He conducted a hearing on September 24-26, 1997. He issued a detailed and thorough decision on May 1, 1998, affirming BLM's final decision.

But the story did not end with the 1994 BLM decision and was not complete at the conclusion of the May 1 ALJ decision. After the date of its 1994 decision, BLM amended its regulations regarding AMPs to clarify, inter alia, that concepts of multiple use be included. Under the definition promulgated in 1995, an AMP is a

> documented program developed as an activity plan, consistent with the definition at 43 U.S.C. 1702(k), that focuses on, and contains the necessary instructions for, the management of livestock grazing on specified public lands to meet resource condition, sustained yield, multiple use, economic and other objectives.

43 CFR 4100.0-5; 60 FR 9961 (Feb. 22, 1995).

Likewise, the former regulations governing AMPs were rewritten in 1995 and amended in 1996 to cover AMPs and "resource activity plans." 43 CFR 4120.2; 60 FR 9964 (Feb. 22, 1995); 61 FR 4227 (Feb. 5, 1996). The new regulation specifies that directives which cover grazing allotments may be contained in an AMP "or other activity plans intended to serve as the functional equivalent of" AMPs. 43 CFR 4120.2. The new regulation implements more stringent requirements of consultation with the public, and retains Manual directions that any document containing proposed plans affecting the administration of grazing be accompanied by environmental analysis. Id. at subsections (a) and (c).

The record contains discussion of these regulatory changes (e.g., Testimony of BLM employee Brad Hines, Tr. 252-53, 265-67), and an Instruction Memorandum No. NV-90-295, dated September 30, 1991, from the Nevada State Director to District Managers in Nevada providing an instruction format for Multiple Use Decisions (MUDs). (R-44.) 4/ The record also

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4/ In the hearing, Sorensen's counsel indicated that he would stipulate to admission of this document, subject to the limitation that "it's the best evidence as to what the policy is." (Tr. 289.) We do not cite this document as full explication of a policy but rather identify it as a 1991 record document describing MUDs in Nevada in minor detail.

contains documents post-dating BLM's 1994 decision which demonstrate that BLM continued to work with Sorensen on devising a plan for his grazing allotment. E.g. R-4 (Spruce Allotment Evaluation Summary, 1995). This document was issued to the public on May 2, 1995, according to a chronology at R-3.

On January 30, 1998, prior to Judge Sweiter's May 1, 1998, ruling, BLM issued a Final Multiple Use Decision for the Spruce Allotment (1998 MUD). This decision authorized a change-in-use from sheep to cattle based on monitoring data collected from 1993-97, and permitted Sorensen 10,965 active AUMs for cattle. (1998 MUD at 1, 4.) In addition, the 1998 MUD separated the Spruce and Valley Mountain allotments, as had been proposed in the 1993 RLA. Sorensen did not appeal the 1998 MUD, and thus it is effective for the Spruce Allotment, subject to any subsequent alterations of which we are not aware.

Judge Sweitzer issued his May 1, 1998, decision affirming the earlier 1994 BLM decision to choose the no action alternative. On May 11, 1998, Sorensen petitioned the ALJ for reconsideration of the May 1 ALJ decision. The central point of this petition was that BLM's 1998 MUD was inconsistent with Judge Sweitzer's May 1, 1998, decision. Sorensen argued that if the ALJ was right in his May 1 ALJ decision, then BLM could not issue a 1998 MUD based upon similar data and issues discussed in the 1993 EA. The 1998 MUD is attached as an exhibit to Sorensen's petition.

Judge Sweitzer denied the Petition for Reconsideration on May 27, 1998 (May 27 ALJ order). Judge Sweitzer concluded that appellants had "presented no precedent for the proposition that a posthearing factual development, as opposed to a posthearing discovery of prehearing facts, justifies reconsideration of a decision." (May 27 ALJ order at 1.) On the merits he concluded:

> Suffice it to say that BLM's January 30, 1998, Decision is not inconsistent with its January 12, 1994, Decision or my May 1, 1998, Decision. BLM properly considered its initial approval of the RLA, permanent conversion, and IAMP to be invalid because it failed to comply with NEPA. Thereafter, it reconsidered whether to approve these actions and prepared the 1993 [Final EA (FEA)]. It reasonably concluded in the January 12, 1994, Decision that the soundest course of action was to deny approval and delay selection of management changes until after completion of the allotment evaluation and multiple use decision (AE/MUD) process. Its subsequent January 30, 1998, Decision to rely, in part, upon the 1993 FEA in approving the RLA and permanent conversion, after completion of the AE/UD process, is not inconsitent with its prior acts.

(May 27 ALJ order at 2.)

Sorensen filed a timely appeal of both the May 1 ALJ decision and the May 27 ALJ order. Sorensen's arguments can be divided into three categories. First, he presents a number of challenges to the ALJ decision and

order, by cross-referencing prior briefs, portions of the decision, and various record documents and transcript testimony; he claims that these references show that the ALJ erred in identifying the critical issue and critical facts. (Statement of Reasons (SOR) at 8-19.) His principal complaint in this portion of his appeal is that he believes Judge Sweitzer missed the "controlling moment in time" from which to evaluate the issues. Sorensen claims the critical moment is the 1994 BLM decision, which Judge Sweitzer affirmed. Id. at 8. Second, Sorensen raises a number of procedural challenges to BLM's process. He claims that BLM was not obligated to prepare the 1993 EA with respect to the IAMP, but rather should have relied only on the FEIS prepared for the entire Wells District, and that, even if an EA was required, it was insufficient to support BLM's choice of a no action alternative. (SOR at 19-26.) He also argues that Judge Sweitzer erred in not concluding, and that we must hold, that BLM was arbitrary when it failed to adopt the IAMP pending the completion of the AE/MUD process. Id. at 26-33. Finally, he argues that Judge Sweitzer erred in denying reconsideration.

Analysis

Before we can address individual arguments, an identification of the relief Sorensen seeks from the Board resolves this case. Sorensen asks that we "reconsider and vacate" the May 1 ALJ decision. SOR at 38. Sorensen finishes his appeal with the following discussion of his predicament:

> Von and Marian Sorensen find it quite unique that they are spending their limited financial resources to advocate for a position of change ... to advocate for the approval of the IAMP, RLA, and conversion. A casual review of public land litigation before the Board suggests that financial resources spent by appellants and by [BLM] is often centered upon fighting change, as compared to advocating for change. To this extent, this is a unique situation.
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> The whole Sorensen family have [sic] been advocating for change - for improvement in the public land resources within the Spruce Allotment - since before [L]oyd Sorensen, Von L. Sorensen, Kenneth Jones, 41 IBLA 354 (1979). However their efforts have continued to be thwarted. This reality has been especially disturbing because in each situation it has been the BLM which has either initiated the process or encouraged the process, but then when it came time to put the chips on the table, BLM folded and has folded every time. They folded in 1979 and they folded again in 1994.
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> There is an opportunity here for the Board to reverse this trend, and more importantly, to reverse this trend of "static to slightly downward" range conditions within the Spruce Allotment and to authorize grazing management which even BLM expects to improve range conditions. Admittedly this change will cost some money as the ALJ emphasized at page 26,

but this money is undeniably available as the ALJ wished to ignore. Therefore, Von & Marian Sorensen hope - and expect - that the Board

Id. at 38-39 (citation omitted). 5/ Sorensen's Reply does not further elucidate a request for relief.

While we empathize with the Sorensens' obvious distress at the longstanding inability to use the FLPMA process to obtain the results they wish, we are in no position to revisit the 1979 decision of this Board, nor is it an issue here. Likewise, before we consider an appeal, we must ensure that the relief sought by the appellant is possible. As best we can determine, Sorensen wants the Board to invalidate the May 1 ALJ decision and, we gather, to order BLM to put in place the 1993 IAMP. This relief is not possible. Without any further relief that would be satisfactory to Sorensen, at this juncture we can only dismiss the appeal.

[1] This conclusion derives from the concept of mootness. It is well-established that this Board declines to entertain appeals where the challenged action has already occurred and no effective relief can be afforded an appellant. See e.g., Wildlife Damage Review, 131 IBLA 353 (1994). There, the Board dismissed the case on the basis of its inability to grant relief.

> Ordinarily, an appeal will be dismissed as moot where there is no effective relief the Board can give an appellant because the action appealed from has been completed. See, e.g., The Hopi Tribe v. OSM, 109 IBLA 374 (1989); The Sierra Club, 104 IBLA 17 (1988).

131 IBLA at 355. In Blake v. BLM, 145 IBLA 154, 162 (1998), this Board similarly affirmed an ALJ decision to dismiss an appeal for inability to provide the relief sought.

This case fits within the category of those cases which must be dismissed because the Board can do nothing to afford the appellant his desired outcome. The 1998 MUD is in place and effective. Sorensen neither appealed its application at the time, nor complains of it now. It is inconsistent with the IAMP on the fundamental question of the conversion ratio for cattle AUMs, the MUD authorizing 10,965 AUMs while Sorensen propounded 13,100 AUMs on an interim basis.

The Board could not substitute the IAMP for the MUD, in the event this is Sorensen's desired outcome. The 1995 regulations set forth

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5/ Sorensen's reference to a 1979 IBLA decision is to a case in which the Board upheld the decision of the Elko District Office to reject a "project proposed by appellants [that] involves alteration of the native range by reseeding with nonnative species of grass and requires the expenditure of a large sum of private and public funds" prior to the implementation of a district management plan and an AMP. Loyd Sorensen, Von L. Sorensen, Kenneth Jones, 41 IBLA at 356.

specific requirements for consultation and environmental analysis. 43 CFR 4100.0-5; 4120. We are bound by duly promulgated agency regulations, e.g., Arthur Farthing, 136 IBLA 70 (1996), and at this juncture could not order implementation of the IAMP or any document whose adoption did not accord with the procedures of the regulations.

The most generous result possible for Sorensen from this Board, even in the absence of the 1998 MUD, would be for the Board to order BLM to reconsider the IAMP according to the consultation and procedures now in place and the CEQ requirements for NEPA review. Again, even assuming the non-existence of the 1998 MUD, this would provide little assurance to Sorensen that his desired outcome would or could occur.

But the 1998 MUD confounds any conceivable efficacy to be found in such Board ordered-relief. The "I" in the IAMP stands for "interim." Its entire point was to stand on an interim basis pending an AMP, or functional equivalent, with a permanent conversion to cattle. The 1998 MUD is that functional equivalent. As noted, Sorensen's pleadings make no clear effort to detail what he thinks should happen now. They provide less insight into a legal process by which the Board would substitute an interim document for the final 1998 MUD, that has not been challenged even by this appellant.

This leads us to question whether Sorensen is suggesting that we reverse the May 1 ALJ decision so as to put in place the IAMP for the period from the 1994 BLM decision until the adoption of the 1998 MUD. In this, Sorensen would be asking us, as a paper exercise, to retroactively implement the IAMP by finding BLM's choice of the "No Action" alternative to be arbitrary and capricious, and then to choose the alternative of implementing the IAMP, as opposed to the BLM alternative.

[2] Assuming this to be Sorensen's desired outcome, it is again relief we cannot grant. His clearly identified challenge in this appeal is to the 1994 BLM decision to choose the no action alternative within the EA. To the extent Sorensen may wish the Board to substitute its judgment for BLM's on this point, Sorensen misunderstands the procedural nature of NEPA.

This Board recently reiterated the point that NEPA is a procedural, rather than substantive, statute in Southwest Center for Biological Diversity, 154 IBLA 231, 236-37 (2001). As we noted there, NEPA's purpose is to ensure that an agency takes a "hard look" at potentially significant environmental consequences of a proposed action, and reasonable alternatives thereto. See also Colorado Environmental Commission (CEC), 142 IBLA 49, 52 (1997), and cases cited. As we stated,

> the primary mission of section 102(2)(C) of NEPA * * * is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove mining operations, is fully informed regarding the environmental consequences of such action. 40 C.F.R. §§ 1500.1(b) and (c); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987).

154 IBLA at 236.

Moreover, we reiterated in that case the fundamental notion that NEPA requires this "hard look," and, if it is given by BLM, it is not the province of the Board or a reviewing court to substitute its judgment for that of the agency.

> When BLM has complied with the procedural requirements of section 102(2)(C) of NEPA, by actually taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or a court (in the event of judicial review). See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 ! 28 (1980), and cases cited. As we said in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990):
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> > [NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

154 IBLA at 237.

[3] With this understanding of NEPA, it is clear that we would not grant the relief of choosing the IAMP alternative, even were we to construe the "no action" alternative to be based on insufficient or arbitrary logic. Rather, all we could do is reverse the judgment and order BLM to reconsider.

Once again, this would not lead to implementation of the IAMP. That this is so in this case is demonstrated by the interim nature of the IAMP, the existence of the 1998 MUD, and the fact that the time period in question has expired. In this sense, the issue of the IAMP for the 1994-98 period is truly moot. This Board or BLM could expend considerable resources discussing that time frame but it would not change the fact that it is over, and there was no IAMP in place. Any statement in this year that it was would be false.

[4] Further, identifying scenarios where the mootness rule is not absolute would not change any outcome. The major exception to the rule that the Board will dismiss an appeal on the basis of mootness, is that it may decline to dismiss if the issues raised are, in the words of the United States Supreme Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), "capable of repetition, yet evading review." See Predator Project, 127 IBLA 50 (1993); Headwaters, Inc., 116 IBLA 129 (1990). Under that limited exception, jurisdiction may be exercised over a matter which is otherwise moot if (1) the challenged action is too short in duration to

be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same challenging party will be subject to the same action again.

This rubric does not apply here. Sorensen obtained extensive review (and it could be argued unnecessarily so once the 1998 MUD was issued). With the issuance of the 1998 MUD, Sorensen will not be subject to the same decision involving the 1993 IAMP. Sorensen could have attacked the 1998 MUD in an appeal if he did not like the sheep:cattle conversion. His choice to challenge the superceded 1994 BLM decision which rejected his own cattle conversion choice of 13,100 AUMs, instead of the superceding 1998 MUD which also rejected that number, is his own. But the opportunity was there to obtain review of that question in an implementing decision and he rejected it. It was not a question of evading review; Sorensen avoided it. 6/

On the basis of the above analysis, we find that there is no relief that we may provide Sorensen. The issues in this case are moot and the appeal is dismissed.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Lisa Hemmer
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge

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6/ BLM clearly had jurisdiction to enter the 1998 MUD. Cf. Melvin N. Berry, 97 IBLA 359, 361 (1987). The process by which BLM issued the 1994 BLM decision involved consideration of an interim proposal pending full review leading to a final AMP. The fact that the decision was interim in nature, as described above, derives from the fact that Sorensen opposed the 1988 Draft AMP. While resolving that conflict over the interim decision was ongoing, BLM was well within its authority to conduct the 1995 Allotment Evaluation based on further collection of data and issue the 1998 MUD to govern the allotment. Indeed, it is Sorensen's position that BLM was obligated to manage the allotment through a plan.

JAN 29, 2002

IBLA 98-365R	:	155 IBLA 207
	:	NV-010-946
	:	
VON L. and MARIAN SORENSEN	:	Spruce Allotment
	:	
v.	:	
	:	
BUREAU OF LAND MANAGEMENT	:	Petition For Reconsideration
	:	Granted in Part and Denied in
	:	Part

ORDER

On July 18, 2001, this Board issued a decision in this matter involving the Spruce Allotment. Von L. and Marian Sorensen v. Bureau of Land Management, 155 IBLA 207 (2001) (July Board decision). There, we noted that the Bureau of Land Management (BLM) had issued a Final Multiple Use Decision regarding the allotment in 1998 (1998 FMUD), and that the Sorensens had not appealed that decision.

On August 1, 2001, counsel for the Sorensens filed a Petition for Reconsideration on grounds that the Board failed to acknowledge the Sorensens' appeal of the 1998 FMUD which was pending before the Hearings Division. (Exhibit B to Petition for Reconsideration.) BLM did not oppose the petition to the extent correction of the Board's finding was required. Accordingly, the Board accepted briefing by both parties.

On consideration of the filings submitted by appellants and BLM, we hereby grant the petition for reconsideration to correct the decision to reflect the existence of an appeal pending before the Hearings Division. (NV-010-98-06.) Thus, to the extent the decision issued on July 18, 2001, at 155 IBLA 207, states that the Sorensens did not appeal the 1998 FMUD, the decision is amended to reflect that they filed appeal NV-010-98-06 of the

grazing portion of the FMUD with the Hearings Division of the Office of Hearings and Appeals. 1/

The remainder of this order responds to the Sorensens' contention that we must reverse the July Board decision and rule in their favor. However, in the July 2001 Board decision, we made clear that we could not have granted the Sorensens' requested relief, even in the absence of the issuance of the FMUD, because we could at most remand the issue to BLM to reconsider its 1994 decision challenged in this appeal.

> The 1995 regulations set forth specific requirements for consultation and environmental analysis. 43 CFR 4100.0-5; 4120. We are bound by duly promulgated agency regulations, e.g., Arthur Farthing, 136 IBLA 70 (1996), and at this juncture could not order implementation of the IAMP [interim allotment management plan] or any document whose adoption did not accord with the procedures of the regulations.
>
> The most generous result possible for Sorensen from this Board, even in the absence of the 1998 MUD, would be for the Board to order BLM to reconsider the IAMP according to the consultation and procedures now in place and the CEQ requirements for NEPA review. Again, even assuming the non-existence of the 1998 MUD, this would provide little assurance to Sorensen that his desired outcome would or could occur.

155 IBLA at 216-17 (emphasis added).

In their petition, the Sorensens argue that the Board erred in finding that we could not grant relief that would benefit the Sorensens. In doing so, the Sorensens substantially modify their arguments on appeal in this matter.

The central premise of the Sorensens' original challenge was that the ALJ misunderstood the controlling time line of the case

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1/ The Sorensens had also appealed a portion of the FMUD that constituted a decision related to wild horses and burros. This appeal (NV-010-98-07) was forwarded to the Board and docketed as IBLA 98-216. We transferred it to the Hearings Division.

in finding that the Interim Allotment Management Plan (IAMP), Range Line and Management Agreement (RLA), and conversion to cattle had been approved when signed by BLM and Von Sorensen on April 13, 1993, and thereafter rescinded. They asserted that the moment of time from which to evaluate the issues in the case could only be January 12, 1994, the date of the decision issued by BLM; it could not be April 13, 1993, or August 23, 1993, the date of BLM's recission letter. The Sorensens argued that the January date controls because it was the date on which BLM acted.

> [I]t is only at this moment that BLM finally, fully, and properly decided under 43 CFR Subpart 4160 to exercise its discretion relating to the IAMP, RLA, and conversion. Admittedly, BLM signed the IAMP and RLA on 4/13/93, and admittedly this is the time the ALJ and BLM wish to rely [on], but this signing neither approved under 43 CFR Subpart 4160 [n]or implemented the IAMP, RLA, and conversion. Therefore, the deciding moment was 1/12/94, and at that time the consultation process was satisfied and a sufficient NEPA document in the form of an EA was complete.

(Sorensens' Statement of Reasons (SOR) at 8-9.)

The Sorensens claimed that all that preceded BLM's January 1994, decision, which they termed the "GRAZING DECISION," were "twists and turns between 4/13/93 and 12/15/93 [which] were of no legal significance or consequence." Id. at 10. They asserted that when BLM signed the April 1993 IAMP, RLA, and conversion, "no Grazing Decision [was] issued at this time under 43 CFR Subpart 4160 to otherwise approve/disapprove or implement/not implement the IAMP, RLA and conversion." Id. at 9. Rather, the Sorensens stated that "BLM never approved/disapproved the IAMP, RLA, and conversion under 43 CFR Subpart 4160 until 1/12/94, and never implemented the IAMP, RLA and conversion, until BLM approved and implemented the RLA and conversion on 1/30/98." Id. at 11. Finally, they argued that BLM rules governing grazing decisions at 43 CFR 4160 had not been complied with until the EA was completed and consultation concluded. Id. at 9-10.

The Sorensens now ask us to reverse the July Board decision based on a contrary construction of events. They assert that if the Board were to set aside the May 1 ALJ decision, "the IAMP

controls." (Sorensens' Opening Supplemental Brief (Supp. Br.) at 7.) Contrary to their assertions during the appeal that BLM's actions in April 1993 did not constitute a legally signficant event, the Sorensens argue now that if the 1994 BLM decision were set aside the IAMP would spring into effectiveness. In a possible nod to their prior assertions, they deny asking the Board to put into effect the 1993 IAMP; rather they "contend that the setting aside of the * * * 1994 BLM Decision * * * will accomplish just that result." (Supp. Br. at 9.)

We disagree. Until the petition for reconsideration, the Sorensens' position was that the only legally significant action for review by the ALJ was the 1994 BLM decision, because it was based on public comment, input, and review required by 43 CFR Part 4100. The Sorensens conceded that the IAMP had been based on a private agreement rather than a decision subject to critical regulatory requirements of the Part 4100 rules. BLM did not treat it as a grazing decision; rather, on June 4, 1993, BLM proceeded to notify affected interests of "what has been happening on the allotment" and enclosed a copy of the April 1993 documents "for [their] information." See, e.g., R-20. 2/

Based upon objections from the public, e.g. R-31, on August 23, 1993, BLM notified the Sorensens that it was rescinding its approval of the IAMP, pending the conduct of NEPA review and consideration of comments and appeals after forwarding the document to the public. (R-26.) The Sorensens expressly argued that this notice is "of no consequence or significance to the issues herein." (SOR at 9.) Setting aside the Sorensens' clear disagreement with the substantive outcome of this NEPA review, their position in this appeal was that the 1994 BLM decision was the first legally significant grazing decision. Now, the Sorensens argue that we must reverse BLM so that the April 1993 documents — which they formerly argued did not comply with 43 CFR Supbart 4160 and did not constitute an approval, disapproval, implementation, or failure to implement — can spring to life as if approved, implemented and effective.

We will not do so. The Sorensens cannot have it both ways. Judge Sweitzer correctly found that BLM approved the IAMP and RLA

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2/ As in the July Board decision, we identify respondents' and appellants' exhibits with prefixes R- and A-, respectively.

agreements in April 1993. But the ALJ also held that BLM correctly refused to effectuate that approval in the January 1994 decision, because of its failure to comply with legal requirements. Further, the Sorensens' argument that the legal deficiencies that existed at the time of original approval were cured by the issuance of the December 1993 EA would have us reverse the ALJ and then render our own decision on the EA as a matter of first impression. This is because BLM never rendered a decision based on the December 1993 EA to implement the April 1993 documents. 3/ Such an argument fails for the reasons set forth in the July Board decision. Setting aside BLM's 1994 "grazing decision" would have, at best, resulted in remand of the matter to BLM to reconsider whether approval of the IAMP was proper. 4/

Moreover, we reject the Sorensons' argument as an improper subject for reconsideration. Under the terms of 43 CFR 4.403, the "Board may reconsider a decision in extraordinary circumstances for sufficient reason. * * * The petition shall, at the time of filing state with particularity the error claimed and include all arguments and supporting documents." Appellants fail to identify extraordinary circumstances justifying their change of position that the April approvals should be resurrected as legally consequential events, other than that they lost their case. They argued their appeal in a manner that avoided the consequences of BLM's failure to publicize and properly evaluate the IAMP and RLA prior to the 1994 decision. The consequence of that argument was a loss for them. This alone does not justify our review of a different strategy now.

The Sorensens attempt to avoid denial of their petition for reconsideration by denying the applicability of NEPA. They argue that "this appeal is an appeal of a grazing decision, not a NEPA document." (Sorensens' Reply at 2.) They assert that "this is an appeal of a grazing decision that rescinded the effect of an

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3/ Thus, the Sorensens' contention that the Board would not do this but, rather, the result would be "accomplished" (Supp. Br. at 9), erroneously presumes that BLM had already put the documents into effect, a premise the Sorensens repeatedly denied.

4/ As discussed below, in light of the issuance of the 1998 FMUD, the Sorensens' appeal was moot in any event.

IAMP and RLA." Id. (emphasis in original.) While it is true that the challenged 1994 decision rescinded approval of the IAMP and RLA, that decision adopted verbatim the action taken in the December 15, 1993, Finding of No Significant Impact/Decision Record selecting the "no action" alternative within the final Environmental Assessment (EA). (R-35.) See January 12, 1994, Decision at 2. 5/

The Sorensens cannot escape the application of NEPA to any relief the Board could order if it were to have reversed the May 1 ALJ decision and, consequently, the 1994 BLM decision. As we held in the July Board decision, for BLM to implement any decision for interim allotment management would require further NEPA review and compliance with the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (1994), NEPA, BLM regulations and other authorities cited there. 155 IBLA at 209. There has been no finding that the April 1993 approvals complied with NEPA or this body of authority, and reversal of the 1994 BLM decision would not be tantamount to such a finding.

In challenging our conclusion in the July Board decision that the matter is moot, the Sorensens' argue that BLM was without jurisdiction to implement the 1998 FMUD because of the existence of this appeal. (Supp. Br. at 12; Reply at 3-4.) According to the Sorensens, BLM was deprived of jurisdiction to take any action while the subject matter of the IAMP, RLA and the

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5/ The Sorensens argue that the RLA and conversion ratio were not meant to be interim and should be treated separately from the IAMP. (Sorensen's Supp. Br. at 11.) The record refutes this contention. The IAMP stated that "a major action associated with this plan is the formal division of the Spruce Allotment into two separate, private allotments." (A-15, IAMP, at 9.) While the RLA was separately signed, the IAMP stated at page 20 that "[r]elative to the proposed division of Spruce Allotment, the allotment is divided upon acceptance of this plan into two units * * *." These approvals were given pending completion of the allotment evaluation process. The January 1994 proposed decision was to implement the No Action Alternative "as summarized below: (1) Deny approval of the [RLA]. * * * (2) Continue to license cattle use as 'temporary' * * *. (3) Deny approval to implement the Spruce [IAMP]." When no protests were filed, the decision became final. 43 CFR 4160.3(a).

1994 BLM decision was on appeal. See, e.g., McMurry Oil Co., 153 IBLA 391, 392 (2000); Clive Kincaid, 111 IBLA 224, 234 (1989); Melvin N. Berry, 97 IBLA 359, 361 (1987). The Sorensens argue that this argument must be addressed on reconsideration of this appeal because, if they are correct that BLM implemented the 1998 FMUD without jurisdiction to do so, the July Board decision was wrong in finding that their appeal was moot. (Reply at 4 and 6.)

We have similar difficulties with this argument being raised on reconsideration under 43 CFR 4.403, after full review of the case. Having filed that appeal of the grazing decision in the 1998 FMUD, appellants were aware of it from the beginning to the end of proceedings before the Board in this case. According to the notice of appeal (Motion for Reconsideration Exhibit B), the Sorensens did not seek a stay of implementation of the 1998 FMUD. Failing to mention that appeal to the Board, they did not advise the Board of their position on how relief in the two cases could or should be squared. We are reluctant to grant reconsideration in such circumstances.

Nonetheless, these new arguments only reinforce our conclusion that the appeal is moot. The Sorensens are correct that once an appeal is filed, BLM loses jurisdiction over the subject matter of the decision on appeal. E.g., McMurray Oil Co., 153 IBLA at 392.

> When an appeal is properly taken from a BLM decision, BLM loses jurisdiction over the subject matter of the decision on appeal, and can no longer take any action to modify that decision. The Ecology Center, 147 IBLA 66, 68 n.3 (1998); Clive Kincaid, 111 IBLA 224, 234 (1989); Melvin N. Barry, 97 IBLA 359, 361 (1987); James C. Mackey, 96 IBLA 356, 362, 94 I.D. 132, 136 (1987); Sierra Club, 57 IBLA 288, 291 (1981); James T. Brown, 46 IBLA 265, 271 (1980); State of Alaska v. Patterson, 46 IBLA 56, 59 (1980).
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> During the period that the appeal was pending BLM was prevented from taking "[a]ny [dispositive or other] adjudicative action * * * relating to the subject

> matter of the appeal," since it lacked the jurisdiction to do so. Sierra Club, 57 IBLA at 291; see The Ecology Center, 147 IBLA at 68 n.3; Clive Kincaid, 111 IBLA at 234; Melvin N. Barry, 97 IBLA at 361; James C. Mackey, 96 IBLA at 362 n.4, 94 I.D. at 136 n.4; Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371, 374-75 (1985); James T. Brown, 46 IBLA at 271.

153 IBLA at 393-94 (footnote omitted).

However, the Sorensens fail to address the Board's analysis in McMurry of subject matter remaining within BLM's authority.

> If a matter has not actually been decided in the BLM decision on appeal, even a stay cannot operate to prevent BLM from taking action concerning that matter. Similarly, the transfer of jurisdiction on appeal cannot operate to prevent BLM from taking action on a "functionally independent" matter not on appeal.

153 IBLA at 396, citing, inter alia, East Canyon Irrigation Co., 47 IBLA 155 (1980) (East Canyon).

East Canyon established the functionally independent distinction. In that case, the Board noted that

> a temporary use permit [TUP] is discrete from the right-of-way application. Indeed, it must be so, for as this Board has ruled, a TUP may not be utilized for any activity for which a right-of-way grant under section 504(a) of FLPMA is available. * * * Appeal from rejections of the rights-of-way applications, therefore did not stay action on the former, and no error was committed in proceeding to terminate the [special land use permit].

47 IBLA at 170 (citation omitted).

As in East Canyon, we must examine whether an interim authorization is functionally distinct from a final land use plan for the grazing allotment. We find that it is, for purposes of

deciding the jurisdiction of BLM on these facts. 6/

The subject matter of IBLA 98-365 was the 1994 BLM decision which refused to effectuate the BLM's approval of an interim AMP, RLA, and conversion. This was not an implementation decision for a resource management plan (RMP). Rather, the facts were that the BLM issued a Wells Resource Area RMP/EIS [environmental impact statement] in 1985. (R-5a-c.) This RMP/EIS expressly required implementation of its land use planning by allotment management plans (AMPs) (R-5c, ROD at S-1), including one for the Spruce Allotment. When in 1987 the Elko district manager set about establishing an AMP for the Spruce Allotment, 7/ the Sorensens objected. See Von Sorensen Testimony, Transcript of Hearing before ALJ Sweitzer, September 24-26,

1997 (Tr.), at 381.) The Sorensens' consultant, Resource Concepts Inc. (RCI), and BLM agreed on a "process that [would] be used to implement an interim management plan on the allotment and a comprehensive listing of any new items that [BLM] would like to see incorporated into an updated AMP." (A-5, Letter dated June 14, 1991, from RCI to BLM.) RCI's witness, Donald Henderson, testified that RCI submitted a draft "interim AMP" in 1993. (Tr. at 321.)

The "Interim Allotment Management Plan for Spruce Allotment, Wells Resource Area, Nevada" (R-17) expressly stated the parties' understanding that it was "interim" pending a final AMP.

> [T]he parties agreed to jointly develop this interim AMP that would allow for the initiation of project planning and would be implemented and followed until such time as the monitoring data was available to indicate that the provisions and conditions contained

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6/ The Board also considered this issue in Robert B. Bunn, 102 IBLA 292, 297 (1988). Determination of whether issues are "functionally independent" is highly fact specific.

7/See Draft Spruce Allotment Management Plan proposing to convert the permitted sheep preference to cattle, and an "Environmental Assessment, EA-NV-010-87-093," for the "Change-In-Kind of Livestock and Implementation of the Spruce Allotment Management Plan" (1988 Draft AMP). (R-7, R-8, A-15 at 9.)

> in this interim plan were no longer valid. This is expected to occur upon the completion of the allotment evaluation which is currently under progress. At that time, the resource information resulting from the evaluation will be used to modify allotment specific objectives, specify livestock management revisions required [by] this interim plan, be used to develop a new AMP, and to evaluate stocking rates initially agreed to in this Interim AMP and modify as necessary.

(R-17 at 9 (emphasis added).)

Any remaining question that a final AMP was anticipated, and that the interim plan was negotiated as a temporary agreement, is answered unequivocally by the BLM Manual Handbook which was the source of BLM's ability to enter into an interim grazing agreements in the first place. As we noted in the July Board decision, BLM Manual H-4120-1.2.K specifies that if a permittee does not agree to the implementation of an AMP "[i]nterim terms and conditions required to prevent resource damage and minimize conflicts until AMPs are fully operational may be incorporated into permits and leases."

The facts of this case, then, demonstrate that the "subject matter" of the appeal was the terms under which grazing would proceed on an interim basis. Nothing in the 1993 IAMP, RLA, conversion agreement or the 1994 BLM decision on the EA remotely suggests that interim terms would delay or limit BLM's continuing evaluation of the allotment for formulation of an AMP. 8/ An interim allotment management plan is functionally independent of the final plan it awaits. The subject matter of this appeal — the decision to rescind the interim terms — never had a bearing on BLM's continued jurisdiction to manage allotments as required by the Wells Resource Area EIS/RMP and to issue the FMUD.

Accordingly, we reject the Sorensens' argument that BLM was deprived of jurisdiction to move forward with issuance of an FMUD. Such management was fully anticipated by the Sorensens. Indeed, to hold otherwise would be to turn the "interim" option, designed to allow uses to go forward in the face of disputes over

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8/ After 1995 regulatory changes, that document became known as a multiple use decision.

AMPs, into a straightjacket for BLM. We will not read an appeal of BLM's decision to rescind an interim plan to deprive the agency of jurisdiction to issue the final AMP which is expressly anticipated as a consequence of the temporary nature of an interim plan.

Merging the Sorensens' arguments on reconsideration, however, raises an additional concern. The Sorensens' argument that the IAMP would be resurrected as a legally sufficient action, should the Board have reversed the May 1 ALJ decision, combined with their assertion that BLM was deprived of jurisdiction to issue the FMUD pending appeal, raises issues of jurisdiction not previously intimated by either BLM or the Sorensens. Had the Sorensens taken these positions in their SOR, a review of the record would have compelled closer examination of the letters of appeal filed with BLM in June 1993, opposing the April 1993 IAMP, RLA and conversion. (R-22, R-23, and R-24.) In fact, a review of the record shows that those appeals
(NV-010-94-01, NV-010-94-02, NV-010-95-02) were forwarded to the Hearings Division. (R. 30.) Our record does not disclose the extent to which they were abandoned by the appellants because of BLM's January 1994 decision. 9/ Nonetheless, the appeals were not dismissed until those appellants sought withdrawal in March 1995. (A-21, A-23, A-25.)

The Sorensens' claim on reconsideration that the April 1993 approvals are legally sufficient, if argued before, would have raised the specter that BLM may have inappropriately acted pending the appeals to the Hearings Division. McMurry Oil Co., 153 IBLA at 392, and cases cited. 10/ What should have happened depends on arguments not addressed and facts not in the record. But whether BLM correctly exercised its authority during 1993 and 1994, we need not untie this knot. For the reasons stated above, this appeal of the subject matter of the Sorensens' interim

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9/ The record does not include any further pleadings filed in those appeals, but does include letters from the appellants in consultation with BLM regarding the EA, IAMP, RLA, and conversion. (R-31, R-32, R-33, and R-34.)

10/ By arguing that the April 1993 events were not decisions or actions, the Sorensens' arguments presented no question of BLM's authority to issue an appealable decision in 1994.

grazing terms had no impact on BLM's jurisdiction to issue the FMUD. Accordingly, even were the Board to permit the Sorensens to alter their position on reconsideration, under 43 CFR 4.403, the appeal would necessarily be dismissed as moot.

For the reasons stated, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Sorensens' petition for reconsideration is granted to explain that the July 2001 Board decision, 155 IBLA at 207, erred in denying existence of the Sorensens' appeal of the 1998 FMUD, NV-010-98-06, pending before the Hearings Division. Otherwise, it is denied.

Lisa Hemmer
Administrative Judge

Bruce R. Harris
Deputy Chief Administrative Judge

APPEARANCES:

Editor's Note: The names and addrsses have intentionally been omitted.